Supreme Court, U. S.
FILED
SEP 11 1978
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

OCTOBER TERM 1978

NO. 78-406

C. CAREY MATTHEWS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment and Decision of the United States Court of Appeals, for the Fifth Circuit, entered on March 20, 1978, which affirmed an Order and Judgment of the United States District Court for the Southern Dis-

trict of Florida, dated October 13, 1976, denying the Amended Motion of Petitioner to Set Aside a Guilty Plea, Adjudication and Sentence, under 28 USC §2255. District Court Judge C. Clyde Atkins had previously, on August 5, 1975, denied Petitioner's Amended Motion to Vacate, Set Aside Sentence Adjudication and Guilty Plea, under §2255, but on June 9, 1976, the United States Court of Appeals, Fifth Circuit, had reversed the District Judge's Order of August 5, 1975, stating that Matthews was entitled to an evidentiary hearing on his claim, substantial inferences having been raised by his Petition and Exhibits, that threats of coercion had induced his guilty plea.

The U.S. District Judge held an evidentiary hearing, on September 2, 1976, but Petitioner contents that it was a farce and a denial of due process as well as the assistance of counsel under the Fifth and Sixth Amendments to the United States Constitution, because the two principal witnesses for the prosecution admittedly had coordinated their testimony prior to the hearing, rendering the exclusion of the witnesses under the Rules meaningless, and denying due process under the United States Constitution to the Petitioner.

Petitioner claims that as a result of the foregoing, that the alleged evidentiary hearing required by the Fifth District Court of Appeals, before the United States District Judge, C. Clyde Atkins on September 2, 1976, was, in fact, not an evidentiary hearing, but a recital of admittedly prearranged and prediscussed testimony by the principal witnesses for the Government, which violated the due process rights of the Petitioner under the Fifth Amendment to the United States Constitution and denied him the assistance of the counsel who had

represented him at the trial, by reason of the collusive testimony at the evidentiary hearing of September 2, 1976, of his prior counsel and his prior prosecutor, all in denial of his rights to the assistance of counsel under the Sixth Amendment to the United States Constitution.

OPINIONS BELOW

The Order denying Petitioner's Amended Motion to Vacate Plea, Adjudication and Sentence, dated August 5, 1975, is printed as Appendix "A" hereto.

The Opinion of the United States Court of Appeals, Fifth Circuit, dated June 9, 1976, reversing and remanding the said Order and Judgment of the United States District Court for the Southern District of Florida, but rejecting Petitioner's claims of error in that his *Alford* plea was accepted by the trial Court without a sufficient factual basis, is reported at 533 F.2d 900, and printed as Appendix "B" hereto.

The Order denying Petitioner's Amended Motion to Vacate Plea, Adjudication and Sentence, dated October 13, 1976, is printed as Appendix "C", hereto.

The Opinion of the United States Court of Appeal, Fifth Circuit, dated March 20, 1978, affirming the Order of the United States District Court for the Southern District of Florida, dated October 13, 1978, is printed herein as Appendix "D" hereto.

JURISDICTION

The Opinion of the United States Court of Appeals, Fifth Circuit, from which Certiorari is sought was entered on March 20, 1978, and the denial of a Rehearing on said matter, entered on May 11, 1978.

Jurisdiction of this Court is invoked under Title 28, USC §2101(c), and Rule 19(b), Supreme Court Rules.

QUESTIONS PRESENTED

1. Does the decision of the Fifth Circuit Court of Appeals of March 20, 1978, affirming the Order of the United States District Court for the Southern District of Florida, dated October 13, 1976, conflict with the Fifth Amendment to the United States Constitution by denying the Petitioner due process of law.

2. Does the decision of the Fifth Circuit Court of Appeals of March 20, 1978, affirming the Order of the United States District Court for the Southern District of Florida, dated October 13, 1976, conflict with the Sixth Amendment to the United States Constitution, by denying the Petitioner rights guaranteed by the Sixth Amendment to the United States Constitution, to be confronted with the witnesses against him, and to have the assistance of counsel for his defense.

STATEMENT

I. NATURE OF THE CASE

This Petition emanates from a portion of an Order, Judgment or Decision of the Fifth Circuit Court of Appeals, which rejected an assertion of fundamental constitutional error by Petitioner even though reversing and remanding for evidentiary hearing on another point, an Order of the United States District Court, Southern District of Florida, denying Petitioner's Amended Motion to Vacate and Set Aside Guilty Plea, Adjudication and Sentence Under 28 USC §2255, without an evidentiary hearing.

The plea, adjudication and sentence sought to be set aside was to a single Count of an indictment charging certain violations of the Securities and Exchange Act of 1933 and 1934.

The guilty plea was entered under *North Carolina vs. Alford,* 400 U.S. 25, 27 L.Ed.2d 162, 91 S.Ct. 160.

In his §2255 Amended Motion, Petitioner claimed not only that the Government had failed to establish a "sufficient factual basis under Rule 11," but also that his *Alford* plea was coerced by the fraud and deceit of the Assistant U.S. Attorney who conveyed through his defense attorney a false threat that the trial judge had threatened a ten year jail term, if he went to trial and was convicted; alternatively, if the prosecutor's denial be believed, the Petitioner was mislead and deceived by his own counsel, and thus denied the effectual assistance of counsel.

The Fifth Circuit Court of Appeals reversed the District Court's Order denying the Motion without evidentiary hearing, finding that the Petitioner's supporting third party Affidavits raised "a substantial inference that threats or coercion in fact induced Matthews' guilty plea." The Court's decision is included herein as Appendix "B".

Pursuant to the Order of Reversal and Remand by the United States Court of Appeals, Fifth Circuit, United States District Court Judge C. Clyde Atkins, set the cause for an evidentiary hearing on Thursday, September 2, 1976, and on that date, an evidentiary hearing was heard and evidence taken.

On October 13, 1976, the trial Court entered its Order denying the Amended Motion to Vacate Sentence.

The evidentiary hearing adduced facts that showed the very real importance of such a hearing, although the truth was obscured by the fact that the two principal witnesses, former prosecutor Neal Sonnett and former defense counsel, Irvin Block, held pre-hearing private meetings to "iron out" initial differences in their diametrically opposed Affidavits prior filed (App. 35, Affidavit of Block; App. 29, Affidavit of Sonnett).

Suffice to say at this point, that the aforesaid prehearing coordination of the testimony of two principal witnesses, one the former prosecutor and the other, the former defense counsel, as to the principal issue before the Court clearly made the hearing a farce and a travesty of justice, and a denial of due process as well as the assistance of counsel under the Fifth and Sixth Amendments to the United States Constitution.

Although the two witnesses were excluded from each other's presence solemnly by the Court at the time of their testimony, their pre-trial meetings to coordinate and orchestrate their testimony rendered the exclusion of the witnesses under the Rule, totally meaningless, and divested the Appellant of its due process rights under the Constitution.

Their collusive actions destroyed the opportunity of a fair hearing of which more will be said.

On March 20, 1978, the Circuit Court of Appeals affirmed the District Judge's Order denying the Petitioner's §2255 Petition.

In its Opinion, the Fifth Circuit Court of Appeals totally ignored the contentions of Matthews that he had been denied due process as well as the substantial assistance of counsel under the Fifth and Sixth Amendments of the United States Constitution, by reason of the fact that prior to the evidentiary hearing of September 2, 1976, the former Government attorney and his former defense counsel, the two principal witnesses at the evidentiary hearing, held pre-hearing private meetings, admittedly, to discuss their previously filed, directly contradictory Affidavits, and to reconstruct their testimony.

The Fifth Circuit Court of Appeals in its Opinion of March 20, 1978, made no reference to, and totally ignored, the due process allegations of the Petitioner, that there was no meaningful resolution of the conflict in the Affidavits between the two prior counsel since they had resolved the conflict outside the Court and prior to the hearing. Thus, Petitioner contended then and now

that it was not the trial Court which resolved the conflict, but that the conflict was resolved by the collaboration of the two attorneys who were the principal witnesses at the evidentiary hearing.

The constitutional questions raised by Petitioner in his appeal charging denial of the Fifth and Sixth Amendments and due process, were totally ignored by the Court in its Decision.

It is this denial and rejection of the constitutional rights of the Petitioner by both the United States District Court for the Southern District of Florida, and the Fifth Circuit Court of Appeals, which is the subject matter of Petitioner's request for Certiorari in the instant cause.

II. PERSONS INVOLVED

THE PETITIONER: C. CAREY MATTHEWS, former Colonel, U.S. Marine Corps Reserve; Combat Infrantry Commander at Iwo Jima and Korea; wounded three times in action. At 45 still a Reserve Colonel, he volunteered for airborne service and won the Airborne Parachutist insignia at the U.S. Army Infrantry School, Fort Benning, Georgia. A veteran of the 1st and 5th Marine Divisions and member of the 82nd and 101st Army Airborne Division Associations; in 1970 he received the Armed Forces League Distinguished Service Award for valuable service during the Vietnam period as the Commanding Officer of the 4th ANGLICO, USMCR, an elite parachute trained organization.

Petitioner was elected to the Florida Legislature in 1960 and served six terms until his resignation, due to the conviction of the charge herein involved. During this period, he was reelected to serve the people of Dade County six times, three without opposition and rose to the position of Majority Leader, Florida House of Representatives, and held that post at the time of the coerced plea hereinabove referred to.

Petitioner became a member of the New York Bar in 1949 and the Florida Bar in 1954. He held the honorary post of Special Assistant to the Attorney General of Florida for a number of years and served on various important committees of the Florida Bar.

THE RESPONDENT: The United States of America, as represented by the U.S. Attorney for the Southern District of Florida, and the Solicitor General of the United States.

III. THE CASE

Petitioner instituted an action under the provisions of 28 USC §2255, seeking to vacate and set aside Petitioner's Guilty Plea Adjudication and Sentence, previously imposed by the United States District Court for the Southern District of Florida.

On January 7, 1972, the Petitioner, C. Carey Matthews, hereinafter referred to as either Petitioner or Matthews, in the District Court of the United States for the Southern District of Florida, entered a plea of guilty to a single Count, charging him and others with certain violations of the Securities and Exchange Act of 1933 and 1934.

After having pled not guilty to all Counts of the said indictment and having concluded preparations for trial, on the eve of the trial, after negotiations between his counsel and counsel for the United States, Petitioner entered into an arrangement whereby he entered a plea of guilty to the aforesaid single Count.

At the time of entering the plea, Petitioner maintained his innocence, entering an *Alford* plea, and has at all times since the entry of the plea.

Subsequent events and discovery by the Petitioner led him to believe that his plea of guilty was fraudulently obtained through the coercion, threats, trickery and deceit of the Assistant United States Attorney handling this matter. Consequently, he brought his Petition, under 28 USC §2255, seeking to vacate and set aside the plea, adjudication and sentence imposed upon him. Petitioner was coerced into entering a guilty plea to

Count 14 of the indictment and tricked into doing so, by reason of what he now believes to be a false threat conveyed by the prosecuting attorney to Petitioner's counsel and through him to the Petitioner, that United States District Judge, Peter T. Fay, the trial judge, had conveyed the information and the threat that if Petitioner was going to trial, the other Defendants having taken pleas in exchange for favorable sentences, that the said Judge would sentence the Petitioner, if convicted, to at least ten years in prison.

Petitioner believed that such threats were true and never would have entered a plea of guilty to any Count, except that he believed he was to be denied an unbiased Court and was therefore, coerced into an involuntary guilty plea, while at all times asserting his innocence.

Matthews continued for some years after the entry of the plea and the sentencing to labor under the belief that the alleged threat of a ten year sentence communicated by the prosecuting attorney to Irwin Block, his attorney, and thereafter, to him and to his co-counsel, Philip Mandina, had actually been made by Judge Fay. It was not until a certain Wall Street Journal article referred to in his §2255 Motion was brought to his attention, in April of 1974, that he began to have doubts that the threat may not indeed have been genuine, but was part of a scheme to coerce him into pleading guilty in order to further the political aims of the prosecutor. The Article is Appendix "G".

The type of Judge and person the Honorable Peter T. Fay is, as well as his growing reputation for justice and fairness, further indicated to Matthews the possibility that such threat may never have been made.

The Petitioner finally became convinced by remarks made by Judge Fay at a hearing on January 10, 1975, on Matthews' Petition for Termination of Probation, that Judge Fay certainly could not have made such a threat. Fay denied the Petition, but stated:

> "I have serious doubts that I will ever take another plea under the *Alford* principle, because it's just a horrible, horrible situation and you end up with exactly what Mr. Matthews has ended up with. He has ended up with a five year punishment.
>
> "I am perfectly aware that probation is a punishment, a severe punishment in Mr. Matthews' case, because, as I understand it, he cannot practice law. It is a severe punishment.
>
> "Yet he has consistently professed that he is completely innocent. Under the *Alford* case, the plea can be accepted even with that situation, and I will stand by the statement I made then, at least that I think I made then, that the whole procedure is completely inconsistent with the administration of justice. There never has been and apparently there never will be, a true adjudication of whether this man is innocent or guilty of these charges that were brought against him."

It seemed inconceivable to the Petitioner, having heard those remarks, that Judge Fay would have made such a threat. As a result thereof, Petitioner filed his Motion under §2255, being convinced of Judge Fay's

sincerity and acting on Judge Fay's invitation to come forward.

The focus of the testimony at the hearing of September 2, 1976, dealt with the allegations of Matthews' sworn Amended Motion to Vacate Plea, Adjudication and Sentence, that his plea was coerced by information conveyed to him by his attorney, Irwin Block, that Neal Sonnett, the Assistant United States Attorney in charge of the criminal Division, had related to him that Judge Fay had told him that if Matthews went to trial alone, the other Defendants having already entered pleas of guilty, and if Matthews was convicted, he would be sentenced to at least ten years in prison.

The initial witness called was the same Neal Sonnett whose testimony watered down considerably his Affidavit filed prior in this cause in opposition to Petitioner's Motion, that unequivocally he had not conveyed such information to Block on the eve of trial. (App. 48, 49, 50).

Sonnett, stating from the stand that he had great respect for Block's integrity, character and truthfulness, testified that he "can understand" that something he said to Block, after a Pre-Trial Conference with Judge Fay, while Block waited outside Judge Fay's chambers, under the circumstances, could have given an impression that Judge Fay had made a statement that if Matthews did not plead guilty and was convicted after trial, he would draw a ten year sentence. (App. 48, 49, 50).

This testimony by Sonnett for the first time revealed an admission by the Government's former

prosecutor that a conversation had taken place between him and Block whose tenor was such that Block might have the impression from Sonnett that such a threat had been made or that such information had been conveyed to him from Judge Fay.

Both Sonnett and Block declined to characterize, at the hearing, this information as a "threat" but nevertheless, when the information was conveyed from Block to Matthews it was a direct threat of a 10 year prison sentence. In any event, that information, as Matthews testified, as Block stated and as Mandina, Matthews' former law partner testified, coerced or forced Matthews to plea guilty and he would have never entered such a plea, without that coercion. (App. 50-51).

No one denied or refuted Matthews' testimony that Block conveyed the promise or the threat of a ten year imprisonment to Matthews if convicted after trial. Matthews states it; Block and Mandina corroborate it; no one refutes it.

Now, for the first time at the evidentiary hearing, of September 2, 1976, Sonnett admitted that he may indeed have said something to Block after meeting with Judge Fay which could have given Block that impression, an impression which when conveyed to Matthews by Block took away Matthews' free will and coerced the entry of a guilty plea. (App. 48-50).

Block testified after Sonnett and he agreed, that after the Appellate hearing, before the United States Court of Appeals, Fifth Circuit, in this cause, he and Sonnett had met several times to discuss their prior Affidavits in this cause. (App. 48).

Block twice stated under oath, that the Affidavit which he, himself, had dictated and which is a supporting Exhibit to the Matthews' Petition (App. 35) was true, and that he did convey to Matthews the information that Sonnett had advised him that the Court had indicated to Sonnett that if Matthews went to trial and was convicted, he would draw a substantial sentence, in excess of ten years.

Also, Block stated that Matthews then decided to enter his plea of guilty rather than take the chance of being sentenced to ten years in prison.

He offered additionally, that whatever the exact language of Sonnett's statements to him, they caused him to understand that the Court had indicated to Sonnett that if Matthews was tried alone and was convicted, he would be sentenced to a ten year prison sentence, and he conveyed that information to Matthews.

Philip J. Mandina, Matthews' former law partner, testified and strongly supported the Petitioner's Amended Motion. His testimony closely parallels his Affidavit previously filed herein (App. 29).

His Affidavit, as well, had testified to Matthews' innocence of the charge to which he had entered the *Alford* plea. Mandina testified that on the eve of trial, he and Matthews had been preparing for the forthcoming trial in their offices, when Block called and that both Mandina and Matthews talked to Block on telephone extensions.

Matthews had already decided and determined, at this time, according to Mandina, to go to trial regardless

of the pressures being brought to bear on him, of Dobson's recanting on his promise to tell the truth to the Court and to testify as to Matthews' innocence and regardless of the offers being made by the prosecution through Block of leniency if he would enter a plea of guilty to any charge. (App. 56).

Mandina testified that Block on his pre-trial telephone call, which he placed on January 7, 1972, stated to him and to Matthews on the telephone extension that Block had just come from the discussion with Sonnett and that Sonnett had advised him that the trial Judge had conveyed to him that if Matthews went to trial and was convicted, he would draw a ten year prison sentence. (App. 53, 54, 55).

Matthews and Mandina were both stunned and Matthews stated to Mandina, according to his testimony, that he could not afford to take such a chance, because of his three children, one, three and four years old.

Matthews, then, under this coercion, according to Mandina, met Block in order to appear before the Judge and enter his plea which Mandina stated he would never have done except for the coercion of the message conveyed by Block from Sonnett. (App. 56).

Matthews then testified himself as a final witness during this proceeding.

His testimony corroborated and substantiated the details of the sworn Amended Motion to Vacate Plea, Adjudication and Sentence.

Matthews further testified that on the day when Block had conveyed the threat of the jail sentence to him, and he had finally decided by reason of this coercion alone to enter a plea of guilty, he met Block at the Courthouse to go before the Judge.

Several times, then, he asked Block if the information as to a ten year prison term had, indeed, been conveyed to him by Sonnett and Block said that indeed it had.

Matthews was then brought before Judge Fay and entered his plea under *Alford vs. North Carolina*, and was asked by Judge Fay the routine questions asked when a guilty plea is accepted, including whether or not he had been threatened or coerced into entering his plea.

He, not being under oath, stated that he had not been threatened or coerced.

Matthews testified that he had so stated on January 7, 1972, at the time of entering the guilty plea, had actually been the person who had made the threat to imprison him for ten years, if convicted at trial, on that very day, and he felt that if he revealed the threat in open Court that the Court would then be totally hostile, reject his plea, put him to trial, and if convicted, would sentence him to an even harsher term. (App. 58).

Furthermore, Matthews testified he knew of his own experience, which was almost entirely in State Courts, that the "guilty plea colloquy" where a plea is negotiated, was largely a charade where the Defendant has been promised a light sentence or a reduced charge in exchange for his guilty plea, but denies to the Court

on interrogation that any promises have been made to him, while the prosecutor and his own defense counsel, who have exchanged the promises on his behalf, look on in silence to his necessary untruth, which is part of the plea bargaining game.

This procedure is largely changed now, even in State Courts, but the practice prevailed on January 7, 1972.

In any event, neither Irwin Block, his attorney, or Neal Sonnett, the Chief Prosecutor, who had discussed on that very day the alleged statement by Judge Fay about giving Matthews a ten year prison term, said a word as to what had transpired between them, although both being officers of the Court, far more than Matthews, the Defendant, had a duty to step forward. In Block's case he owed the duty of "loyal counsel" under the Sixth Amendment.

Sonnett's duty as a prosecutor was, of course, more heavy, to the Defendant. His conduct in the Dobson and Zimmerman matters in the pre-trial preparation of the instant case and as evidenced by a certain Wall Street Journal article referred to in Matthews' later testimony (App. 21), showed conclusively that his only concern and interest was to obtain a conviction at any cost.

At the time of sentencing, the same situation prevailed as of the time of answering the guilty plea, and Matthews did not dare to reveal what he knew of the alleged threat by the trial Judge for fear of receiving an even harsher sentence if convicted after trial.

The prosecutor and the defense counsel likewise stood mute although it was they who had conveyed the so called threat or information to Matthews of the ten years prospective sentence. As Sonnett testified, something he had said "might have given Block that impression." (App. 48-50).

REASONS FOR GRANTING THE WRIT

Viewing the testimony presented at the Evidentiary Hearing, the Exhibits and Affidavits in this cause, a fair minded man could come to no other conclusion but that a threat had been conveyed to Matthews by his counsel on the eve of trial, that unless he did plea guilty, the trial Judge had indicated he would receive a ten year sentence, if convicted. It was unquestionably the basis on which Matthews entered his *Alford* plea.

Three men have sworn to it; Matthews, Block and Mandina, and even the Government prosecutor, lauding the character and truthfulness of Block, testified that he "can understand" that something he said to Block after a pre-trial conference with Judge Fay, while Block waited outside the Judge's Chambers, under the circumstances in question, could have given an impression to Block that the Judge had made the statement that if Matthews did not plea guilty and was convicted, he would draw a ten year sentence. In short, Sonnett's own testimony conceded that Block did convey such a message to the Petitioner.

As a matter of fact, this testimony by Sonnett was a departure and a watering down from his original Affidavit submitted by the Government and was an admission by him that a conversation had taken place between him and Block outside the Judge's Chambers, whose tenor as such that Block might have the impression, ("misimpression" Sonnett called it), from Sonnett that such a threat had been made or that such information had been conveyed to him from Judge Fay.

The initial Affidavits of both Block and Sonnett showed a clear-cut clash as to whether or not Sonnett did convey such a threat of a ten year sentence to Block. Block's Affidavit said he did; Sonnett said he didn't.

After the hearing before the Fifth Circuit Court of Appeals in re this §2255 Petition, Sonnett and Block both testified that they "got together" several times, to try to "reconstruct" this matter. The result of said "reconstruction" is that Block elaborated on his Affidavit by stating that he related to Matthews the impressions and implications that he received from Sonnett that the Judge indicated that Matthews would receive a severe sentence if he went to trial and did not plea guilty.

Most importantly, however, Block twice reiterated, under oath, at the Evidentiary Hearing, that the Affidavit which he, himself, had dictated and which is a supporting Exhibit to the Matthews' Petition, (App. 35), was true, and that he did convey to Matthews the information that Sonnett had advised him that the Court had indicated to Sonnett that if Matthews went to trial and was convicted he would draw a substantial sentence, in excess of ten years.

As pointed out in the testimony of Sonnett, Block is an extremely experienced, capable, and able, counsel. Certainly, Block was not a neophyte or novice, who would easily or erroneously come to a conclusion that information was being conveyed to him that the Petitioner would receive a specific sentence, i.e., a ten year sentence, unless he pleaded guilty.

The very existence in the purported message of a specific term of years, i.e., ten, makes it obvious that there was no vague allusion as to a harsh sentence from which Block was obtaining a "misimpression," but a direct statement of a ten year sentence.

As to what exact language of his might have given Block the impression that the Judge had indicated Matthews would receive a ten year sentence unless he pleaded guilty, Sonnett indicated that he didn't recall. What is certain, and what the evidentiary hearing did establish was, that a colloquy took place between Sonnett and Block, on the day of the plea, but prior thereto, outside the Judge's Chambers, after Sonnett had had a visit with the Judge to discuss the Petitioner's case and potential plea and sentence, without Block being present.

It was further established that after the conference, alone with the Judge, Sonnett stepped out of Chambers and in the hallway, and discussed with Block his conversation with the Judge.

It is established by the admissions of Sonnett, although he denied conveying the threat of a sentence, that some of the things he said to Block could have given Block the impression, "under the circumstances," that the Judge would sentence Matthews to a ten year sentence, if convicted after trial.

It is further clear that Block immediately called Matthews and Mandina and advised them that such information had been conveyed to him.

He stated, at the Hearing, that he conveyed this message in terms of the "impressions" he had obtained from his conversation with Sonnett. However, his Affidavit (App. 35), unequivocally stated:

> "On the eve of trial, the undersigned was contacted by Neal Sonnett, Assistant United States Attorney, and to the best of undersigned's knowledge, advised that the Court had indicated to him, Mr. Sonnett, that if Carey Matthews went to trial and was found guilty, he would be sentenced to a substantial term of years, the exact number of which Affiant does not remember today, but which he believes to be in excess of ten years.
>
> "Your Affiant immediately conveyed this information to Carey Matthews, who, thereafter decided to plea guilty rather than take the chance of being sentenced to the time indicated by the Assistant United States Attorney."

At the evidentiary hearing, Block was twice asked whether this Affidavit was true, which indicated a flat statement to him of the threat by Sonnett rather than simply "impressions."

In each case, to each question, Block answered that his Affidavit was true and that Sonnett said the Judge had said that if Matthews went to trial and was found guilty, he would be sentenced to a ten year term. One hour later, after receiving the message, the Petitioner entered his plea, coerced by the thought and by the threat that the trial Judge was hostile and would sen-

tence him to a ten year term if he did not plead guilty and was convicted.

The foregoing established facts show conclusively a misrepresentation or lure by the prosecution which induced this plea of guilty and is, on its face, reason to invalidate the plea.

By Sonnett's own admissions whatever the words were that he, the Chief of the Criminal Division, an extremely experienced prosecutor, spoke to Irwin Block, Petitioner's counsel, an equally experienced defense attorney, they were sufficient for Block to be advised that he was receiving information indicating that the Judge would harshly sentence Matthews if he did not plea guilty, and he immediately conveyed this information to his client which induced the plea. Certainly those words, whatever they may have been, which concededly Sonnett did say, were not stated without meaning or purpose in the context of a matter of such great import to a Defendant to which both of these attorneys owed heavy duties at law; one, that of loyal and effective counsel under the Sixth Amendment, the other: that a prosecutor owes to the Defendant and to the United States to see that a fair trial is accorded a Defendant, under the "fundamental fairness" doctrine. A message, however, conveyed from prosecutor to defense counsel of such a nature as testified to herein could only have one meaning or one purpose, i.e., to induce, lure and pressure the Defendant to enter a plea of guilty.

The prosecutor had to know that such a message, however conveyed, must, of necessity, be relayed from counsel to his client. The message was relayed, and

therein lies the misrepresentation, duress and coercion which rendered this plea invalid.

Such a promise of differential sentencing, conveyed deliberately, by whatever means or words from the prosecutor to the experienced defense counsel, specific enough to contain the phrase, "a term of ten years," is per se coercion, invalidating the guilty plea.

This has long been established in American Federal case law, stemming back to and beyond the landmark and often quoted citation of the *United States vs. Tateo*, 214 Fed.Sup. 560. That cause involved a proceeding on a Motion to Vacate a Judgment of conviction on the ground that the Defendant's plea of guilty had been coerced.

The District Court held, inter alia, that where the trial Judge announced that in the event of a conviction he would impose consecutive sentences and based on such statement, Defendant's counsel advised the Defendant thereof so that he might receive a substantially lesser sentence by pleading guilty, and Defendant did then plead guilty, that said plea was not voluntary and his Motion to Vacate was granted.

Importantly, the Court held that even though the trial Judge's statement was not designed to mislead the Defendant or to induce his plea of guilty, that the lack of design was immaterial, since the question was whether the statement did have that impact on the Defendant.

The Court stated in *United States vs. Tateo*, S.D. New York 1963, 214 Fed.Sup. 560, 567:

"No matter how henious the offense charged, how overwhelming the proof of guilt may appear, or how hopeless the defense, the Defendant's right to continue with his trial may not be violated. His constitutional rights require the Government to proceed to a conclusion of the trial and to establish guilt by independent evidence should not be exercised under the shadow of a penalty — that if he persists in the assertion of his right and is found guilty, he faces in view of the trial Court's announced intention, a maximum sentence, and if he pleads guilty, there is the prospect of a substantially reduced term. *To impose upon a Defendant such alternatives amounts to coercion as a matter of law.*"

(Emphasis Supplied)

In short, the rule of *Tateo* quoted and cited as authority by the Fifth Circuit in *Thomas* is that offering or threatening alternatives as to differential sentencing if a Defendant does not plead guilty, is coercion as a matter of law, when conveyed to a Defendant, whether or not the Court or the prosecutor conveying the information does so, with the design to place upon the Defendant such a coercion.

From the testimony revealed at the Evidentiary Hearing, in the instant cause, it would appear that there was a deliberate design by the prosecutor to place such coercion upon the Defendant, through the information conveyed by whatever means, to his defense counsel, at the pre-trial bargaining meeting between the two attorneys.

Certainly the record herein reveals that the Government prosecutor conveyed sufficient information to Block, a highly experienced and able counsel to lead him to believe, deliberately or otherwise, that the trial Judge had threatened a ten year sentence to Matthews if he did not plead guilty and was convicted.

Sonnett says that some remarks of his which he cannot specifically recall, may have given this impression to Block.

If, in fact, the Court did not believe that Sonnett had either flatly stated or by clear statements given an experienced lawyer like Block such an impression, you can only conclude that Matthews had been misled and deceived by his own counsel. If such were true, the Court must conclude, of course, under the United States Constitution, definitely and certainly, Matthews would have been denied the effective assistance of loyal counsel and denied due process.

This would then not be a situation where there was some contention that the defense counsel was inept or incompetent, the situation would be one of absolute disloyalty where defense counsel simply misled and deceived his own client desiring to push him into a plea of guilty.

As the Fifth Circuit Court of Appeals stated in *MacKenna vs. Ellis,* 280 F.2d 592, in granting habeas corpus to a prisoner:

"He is entitled to the effective wholehearted assistance of counsel and to the undivided loyalty of counsel."

Obviously, the entire fundamental fairness required in accepting a plea under due process would be vitiated if the Defendant's own counsel deliberately misrepresented to him that threats had been conveyed to him of a harsh sentence from the Judge, through the prosecutor.

It would be disheartening to believe that is the situation in the case at bar, but the actions of Block in holding pre-hearing meetings with Sonnett to coordinate their testimony casts serious doubt on his conduct and merits close attention by this Court.

In essence, since the most important issue to be heard, as directed by this Court, was to "resolve the conflict" between the Affidavit of Sonnett and Block in this cause, the pre-trial meetings between the two, to discuss their Affidavits and Testimony, and to "reconstruct" the question, rendered the hearing only a post mortem and a farce, since their collusive testimony was already agreed upon.

Of little use indeed, was the invoking of "the rule" at the hearing so that Sonnett and Block could not hear each other's testimony! The entire spirit if not the letter of the Federal Rules of Evidence was violated. The Advisory Committee note as to Rule 615 states: "The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy and collusion." (Citing Wigmore §§1837-1838).

The pre-hearing coordination of testimony by Sonnett and Block, condoned by the trial Court, rendered

the hearing a nullity, and denied due process to the Appellant.

Another aspect of Block's conduct in re this hearing that merits attention, is Block's insistence that his secretary had actually not sworn him in at the time he signed the Affidavit appended to the Appellant's original Petition, charging Sonnett with *directly* coming to him, with an unequivocal threat supposedly from the trial Judge of a ten year jail term if Matthews did not plead guilty and was convicted.

Florida Statute 117.09 makes such a false notarial certificate a felony, and to participate as a party to such a certificate, also felonious.

Block also knew the purpose for which Matthews had requested the Affidavit from him, to support this Petition to Vacate Sentence.

He apparently was motivated to an extreme extent with a desire to avoide any perjury charge by reason of his factual support by sworn Affidavit of Matthew's contentions of a directly conveyed threat.

This agitation apparently led to the out-of-Court pre-trial meetings between Block and Sonnett to "reconstruct" the situation and to resolve the conflict between the Affidavits of the two which, of course, made the hearing a mockery of justice. The purpose, as a full reading of their testimony shows, was to protect each other. That protective coating, a result of their prehearing reconstruction now forever obscures the truth and denies the Appellant a fair hearing and due process.

Clearly and certainly, Block conveyed to Matthews the message that the prosecutor had advised him of a threat of a harsher sentence from the Judge i.e., a specific term of ten years.

Sonnett himself does not deny that such a conversation took place, and that words which he stated he "cannot recall" may have given such a "misimpression" to Block. Certainly whatever the words specifically stated by Sonnett were to Block, they were of sufficient clarity and were unambiguous enough that Block believed a definite sentence, i.e., ten years would be imposed, if Matthews did not plead guilty.

This was not inept or incompetent defense counsel. No vague allusion would have been misunderstood or misinterpreted by him.

One can only logically conclude therefore, that Sonnett's remarks, in re the Judge's sentence in this cause were sufficiently strong enough and explicit enough to fairly give Block the belief that the trial Judge had made such a remark.

Block certainly and obviously, as we know from the Evidentiary Hearing, did not make the statement up out of whole cloth. From the initial Affidavit submitted by Sonnett one would have been led to believe that. Herein we see the value and the need of an Evidentiary Hearing to an accused and to a Defendant.

We know now, and the Court knows now, that such remarks were made by the prosecutor to Block.

That Sonnett as prosecutor had a duty to refrain, under the circumstances of the plea bargaining as he did from the trial judge's office, from conveying to Block, the defense counsel, the clear impression that the judge had promised a harsh sentence if the Defendant did not plead, is clear, is obvious and is well known.

The duty of a prosecutor in such a situation has been spelled out in no uncertain terms in a landmark decision by our own Fifth Circuit Court of Appeals, in *Ginsberg vs. United States,* 257 F.2d 950, another case originating in the United States District Court for the Southern District of Florida. The Court said:

> "A United States District Attorney carries a double burden; he owes an obligation to the Government, just as any attorney owes an obligation to his client to conduct his case zealously but he must remember also that he is a representative of a Government dedicated to fairness and equal justice to all and, *in this respect, he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important that the Anglo-American Criminal Law rests on the foundation: better the guilty escape than the innocent suffer. In this case, zeal outran fairness.*"
>
> (Emphasis Supplied)

Certainly in the context of the instant cause, the prosecutor had the duty and the obligation to the accused in the interest of fairness to assure that no language of his could fairly and reasonably give defense counsel the right to believe that the trial judge had

made such a threat of a harsh sentence as that revealed by the evidence herein.

In the context of his Petition, it must be recognized that he has consistently professed his innocence to these charges even while pleading guilty under the duress which the testimony here has revealed.

The testimony of the prosecutor alone at the evidentiary hearing is and should be, sufficient under the "fundamental fairness" doctrine of our Constitution to mandate the withdrawal of the plea in this cause and the opportunity for trial which is his constitutional right.

In the alternative the Petitioner submits that if, as the Government contends there was no threat conveyed by Sonnett to Block, then Matthews was denied his Sixth Amendment right to effective assistance of counsel. If, in fact, no threat was conveyed to Block by Sonnett, it *must* have been Block that misrepresented to Matthews that a threat was made (based upon the uncontradicted evidence that Block conveyed to Matthews the threat of a ten year sentence). Based upon such misrepresentation, and a denial of Matthews Constitutional rights, the Appellant submits that the Order of the Trial Court should be reversed.

It is well settled in this Court, in granting habeas corpus to a prisoner, that the Defendant is entitled to the "effective, wholehearted assistance of counsel and to the undivided loyalty of counsel." See *Mackenna vs. Ellis*, 280 F.2d 592.

Obviously, the due process right of the Defendant would be violated if the Defendant's own counsel deliberately misrepresented to him that threats had been conveyed to him of a harsher sentence from the Judge, through the prosecution.

CONCLUSION

The undisputed evidence presented at the evidentiary hearing, revealed that the most important issue to be heard, as directed by this Court, i.e., the "resolving of the conflicts" between the Affidavits of prosecutor Sonnett and defense counsel, Block, was permanently obscured by prehearing meetings, held between the two, to discuss their Affidavits and their testimony in regards to the same to be held at the evidentiary hearing, and to "reconstruct" and then resolve the conflict, rendered the evidentiary hearing only a post mortem to their out-of-Court coordination meetings, and a farce, denying due process to the Appellant.

The prehearing coordination of the testimony of Sonnett and Block at the evidentiary hearing, condoned by the trial Court, rendered the hearing a nullity, and evidenced a denial to the Appellant of the services of loyal counsel under the Sixth Amendment of the Constitution of the United States.

Accordingly, the decision of the Fifth Circuit of March 20, 1978, affirming the Order of the United States District Court for the Southern District of Florida, dated October 13, 1976, conflict with the Fifth Amendment to the United States Constitution by denying the Petitioner due process of law and conflict with the Sixth Amendment to the United States Constitution, by denying the Petitioner rights guaranteed by the Sixth Amendment to the United States Constitution, to be confronted with the witnesses against him, and to have the assistance of counsel for his defense.

By reason of the foregoing, the relief sought herein by the Petitioner should be granted, and the Writ of Certiorari should be issued forthwith.

Respectfully submitted,

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By_____
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing was this ____day of September, 1978, mailed to:

LLOYD G. BATES, ESQ.,
U.S. Attorney
Ainsley Building
Miami, Florida

and

OFFICES OF THE
UNITED STATES ATTORNEY GENERAL
WASHINGTON, D.C.

By _____
Leo Greenfield